United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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P/S

74-2168

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, INC.; CATHERINE BEATTIE, individually and as a member of the VERMONT NATURAL RESOURCES COUNCIL, INC.; CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2; and LESLIE A. PARKER, individually and as a member of CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2,

Plaintiffs-Appellants,

v.

CLAUDE S. BRINEGAR, Secretary of Transportation, DAVID B. KELLEY, Division Engineer, Federal Highway Administration; H. JAMES WALLACE, FRANK S. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW and WILLIAM COSTA, in their capacities as members of THE VERMONT STATE HIGHWAY BOARD; and JOHN T. GRAY, Commissioner of Highways, State of Vermont,

Defendants-Appellees,

TOWN OF ST. JOHNSBURY,

Defendant-Intervenor-Appellee.

On Appeal From The United States District Court
For The District Of Vermont

BRIEF FOR APPELLEES

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2

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BRIEF OF STATE OF VERMONT APPELLEES

Preliminary Statement

This brief is submitted as an answer to the Appeal from the Order entered on August 16, 1974, and Findings of Fact, Conclusions of Law, and Opinion filed August 21, 1974, in the United States District Court for the District of Vermont by the Honorable Albert W. Coffrin, United States District Judge. The Findings of Fact, Conclusions of Law, and Opinion are not to date reported.

STATEMENT OF ISSUES

I. Whether an Environmental Impact Statement prepared by the Vermont Highway Department under the direction, guidance, and specifications of the Federal Highway Administration and reviewed, revised, and adopted by the Federal Highway Administration constitutes a "detailed statement by a responsible official" within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969 42 USC Section 4332(2)(c).

II. Whether the responsible officials actions relative to the consideration of alternatives were in fact sufficient as required by Section 102(2)(c) of the National Environmental Policy Act of 1969 42 USC 4332(2)(c), and as found by the District Court coupled with the evidence and on balancing the equities warranted the District Court's denial of the injunction against the Defendants.

III. Whether the Vermont Highway Department's activities on the Sleepers River come within the purview of the Federal Water Pollution Control Act Amendments of 1972 33 USC Section 1301,1444, or the Rivers and Harbors Act of 1899 33 USC Section 403 and 407.

IV. Whether the District Court was within the precepts of applicable law and equity in its findings and order.

STATEMENT OF CASE

I. Prior Proceedings.

In July of 1973, Federal Highway Administration (FHWA) announced the availability of the draft Environmental Impact Statement (EIS) prepared by the Vermont Highway Department (VHD) under the supervision, direction, and control of the Vermont District Engineer of the Federal Highway Administration. The Statement covered the proposed construction of the last section of Interstate and Defense Highway I-91 from Ryegate to Lyndon, Vermont (24 miles), Interstate and Defense Highway I-93 from the Connecticut River to an interchange with I-91 near St. Johnsbury, Vermont (11 miles), and a section of US Rte. 2 necessary as a connector to I-91 at St. Johnsbury (4.3 miles). Comments were received and a final EIS was drafted containing answers thereto and sent through the FHWA for final approval. On April 22, 1974, the Council on Environmental Quality published in the Federal Register

the availability of the final EIS. On May 22, it became a final document adopted by the Secretary of Transportation. The Final Document covered only I-91 and the connector to US Rte. 2. On May 22, 1974, the Vermont Highway Department advertised for bids on Contract 2 (a part of the 24-mile missing link), which included a portion of I-91 in the St. Johnsbury area, including the interchange with US Rte. 2 and .25 miles of US Rte. 2 in order to connect with the existing local road system. The bids were opened on June 14. Three days later the Appellants moved for a temporary restraining order to restrain Defendants from awarding the contract. After a lengthy hearing on the motion on June 20 and 21, the District Court, the Honorable Albert W. Coffrin, denied the Plaintiff's motion for a temporary restraining order on all but the 4.3 miles of US 2 which was not a part of Contract 2 (Op. Page 3), and Plaintiffs, with full approval of all Defendants, moved to consolidate the preliminary injunction hearing with the full hearing on the merits. The District Court took evidence on the merits on July 2, 3, 5, 9, and 10. On August 2, prior to the ruling of the District Court, the Plaintiffs reapplied for a temporary restraining order with respect to those projects involving the Sleepers River and, after a hearing, the District Court restrained construction of the Sleepers River projects for two weeks, not on the basis of the National Environmental Policy Act 42 USC 4332(2)(c) but upon the then unresolved question of whether the Defendants had violated either the Federal Water Pollution Control Act 33 USC 1344 or the Rivers and Harbors Act of 1899 33 USC 403 (Op. Page 4). On August 16, 1974, upon the lapsing of the August 2 Temporary Restraining Order, the Court issued a Judgment Order in which the application for a preliminary and permanent injunction of the aforementioned projects was denied and

construction was permitted to go forward. The District Court did continue injunction against the 4.3 mile project on US 2 pending further order of the Court. On August 19, 1974, Plaintiffs moved in District Court for a stay pending appeal, which, after hearing, was denied, and the Notice of Appeal was filed. The following day, Plaintiffs petitioned the Honorable James L. Oakes, the Weekly Applications Judge for the 2d Circuit, who, after a hearing, entered a partial stay to permit the motion for a stay to be heard by a three-judge panel of this court on Monday, August 26, 1974, the partial stay only disallowing any construction which would actually affect the flow and channel of the present existing Sleepers River. This motion was heard on August 26, 1974, by the three-judge panel and at that time they continued Judge Oakes' partial stay until a full hearing on the merits could be held. Since that time, construction has gone forward on all phases of the project except the actual construction which might affect the flow of the present Sleepers River in its present channel. Since the award of Contract 2, the State of Vermont has also awarded Contracts 1 and 3 north and south of the present project, and construction on these two projects is going forward.

II. The District Court's Decision.

As it relates to appeal, the District Court's decision dealt with the following issues:

1. The Environmental Impact Statement was a detailed statement by the responsible officials within the meaning of Section 102(2)(c) of the National Environmental Policy Act 42 USC 4332(2)(c). The Court found that the NEPA Act does not require exclusive federal participation in preparation of the EIS and that FHWA did significantly participate

in the preparation thereof, and such participation satisfies both the letter and the spirit of the NEPA Act (Op. Page 15).

2. The Environmental Impact Statement was legally sufficient to comply with the requirements of Section 102(2)(c) of the National Environmental Policy Act 42 USC 4321-4347. The Court found that the EIS in its entirety showed a good-faith consideration of all relevant environmental factors and that any deficiencies in the EIS are not of such nature as to find that it did not comply with the requirements of the NEPA Act (Op. Page 25).

3. The contention that the Preservation of Parklands Act of 1968 23 USC Section 138, and the Department of Transportation Act of 1966 49 USC Section 1653(F) applies in this case was dismissed as "if not frivolous, it is at least so remote and speculative as to be without merit" (Op. Page 26).

4. The Court found that the Plaintiffs failed to adhere to the notice requirements of the Federal Water Pollution Control Act 33 USC 1301-1344, Citizens Suit Provision, and that they have not demonstrated that the Sleepers River is a navigable stream under the Rivers and Harbors Act of 1899 33 USC 403-407, and that the Plaintiffs contention under the two acts are without merit.

III. Background.

Interstate and Defense Highway I-91 is part of the national system of interstate and defense highways mandated by the Congress of the United States in 1957. It forms an important link from New York through Connecticut, Massachusetts, to Vermont, up the Connecticut River Valley to Canada.

All but a 24-mile portion of this highway in the St. Johnsbury area is now complete and this missing link is slated for total completion within the next few years. The section under consideration at this time is a vital and important link in this overall highway. The particular section herein involved is also of utmost importance to the Village of St. Johnsbury, one of the major population areas of the State of Vermont which, because of the terrain and the present deficient highway network, is being choked by traffic. The Interstate highway, because of its location and proximity to St. Johnsbury and the interchanges planned therein will relieve the extremely hazardous traffic congestion within the Village and will provide the transportation network needed to bolster the sagging economy of one of the highest unemployment areas in the State of Vermont. Studies have shown and testimony was given that one of the bars to economic growth in the St. Johnsbury area in the past has been the lack of an adequate transportation system. In order to provide adequate connectors between the local road system and the Interstate and Defense highway network, an interchange is needed with Route US 2, a major east-west arterial through the State of Vermont connecting Maine to New York State, at the point where it connects with I-91, a north-south Interstate route. Only with this interchange will adequate and proper traffic service be provided and only with this interchange will the traffic congestion problems presently existing in St. Johnsbury (Op. Page 36), problems that will become greatly aggravated due to the increased traffic generated by the Summer Olympics of 1976, be reduced. The Vermont Highway Department began studies in 1957 towards construction of the Interstate and Defense highway and the necessary connections to the existing road systems and in particular to Route US 2 in the St. Johnsbury

area. There were numerous public hearings held throughout the entire area on this section of I-91 and its connections to the local road systems (EIS Page 22). It is noted that at the time of the initial studies for this route, and up until 1972 when the planning was far advanced, there were no NEPA requirements. The Vermont Highway Department, however, in its normal planning processes, made numerous studies, as was evidenced at the trial, which followed the spirit of the NEPA Act long before its passage. The construction and corridor location of this highway was mandated by the direct actions of the Congress of the United States. Subsequent to the passage of the NEPA Act and following the directive of the Department of Transportation, in 1973 it was determined that an Environmental Impact Statement would be required prior to construction of this section of I-91 to insure that all the effects on the human environment had been properly considered by the decision-makers both at the State and Federal level. In this particular instance, it meant the compilation of the various studies that had previously been made, as well as the making of additional and new studies working closely with the FHWA on a practically day-to-day basis reviewing, compiling, and following their suggestions and recommendations for additional studies as to the impact of this highway on the human environment. Alternatives to the construction location of this highway had been thoroughly explored (EIS Pages 6-9) and a location for I-91 was determined. Because of the local traffic congestion and major east-west route of US 2, it was vitally necessary that this route be connected to I-91 to provide adequate service. Due to the terrain and the needed traffic service, it was determined that only one viable location was available (Op. Page 23). The present Route US 2 leading into St. Johnsbury being a narrow, dangerous,

steep, crooked road with many structures, houses, and businesses in close proximity thereto, is an entirely unsuitable location for any arterial highway. In light of all these considerations, the proposed location was the only viable alternative.

ARGUMENTS

POINT I

AN OTHERWISE ADEQUATE ENVIRONMENTAL IMPACT STATEMENT PREPARED BY THE VERMONT HIGHWAY DEPARTMENT UNDER DIRECTION, GUIDANCE, AND SPECIFICATIONS OF THE FEDERAL HIGHWAY ADMINISTRATION AND REVIEWED, REVISED, AND ADOPTED BY THE FEDERAL HIGHWAY ADMINISTRATION CONSTITUTES A "DETAILED STATEMENT BY A RESPONSIBLE OFFICIAL" WITHIN THE MEANING OF SECTION 102(2)(c) OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 42 USC Section 4332(2)(c).

The cover sheet of the Environmental Impact Statement shows that it is a joint statement of the Federal Highway Administration and the Vermont Department of Highways, and it further states that this EIS for the improvement was developed in consultation with the Federal Highway Administration and that it was approved and adopted by the Federal Highway Administration.

In preparation of the EIS, both the draft and final, the Vermont Highway Department followed the mandates of FHWA's PPM 90-1, setting forth the guidelines and methods to be used in such preparation. This PPM has the specific approval of the Council of Environmental Quality. Throughout the entire preparation of the draft and the final statement, although physically written by members of the Vermont Highway Department, in particular Mr. Arthur Aldrich under the supervision of Mr. Arthur Goss, Assistant Planning Engineer, there was practically daily contact with Mr. Gordon Hoxie of the District FHWA office in Vermont, who worked directly under Mr. David Kelley, the District Engineer. All phases of

the draft and the final statement were piece-by-piece reviewed, commented upon, and suggestions made for additional input or changes, prior to their being incorporated in the draft and in the final EIS statement. The draft was also thoroughly reviewed, commented upon, and additions made at the request of the FHWA regional office in Delmar, New York, when an interdisciplinary team, working under Mr. Donato Altobelli, thoroughly reviewed the statement. At all times, a joint effort was made to include all possible factors affecting the human environment resulting from the proposed construction of this project.

The Second Circuit Court in Greene County Planning Board v. Federal Power Commission 455 F 2d 412 (2d Cir. 1972) held that on the facts of that case the federal agency was the "responsible official" required to make the detailed statement. The facts in this case are very different and clearly distinguishable. First, the federal funds available do not hinge on the acceptance of the EIS, they have already been allocated to the State of Vermont by Congress and the only question is the manner in which they shall be used. This eliminates the issue of bias. It is noted that Conservation Society (II) 362 Fed. Supp. 627 (D. VT 1973) leaned heavily on the potential self-interest of the state due to the legislative mandate to construct. The same argument would hold in this case against the federal agency as the Interstate Highways are mandated by Congress. Secondly, the FHWA kept constant contact, review, input and communication in all phases of the EIS, thus not abdicating a significant part of its responsibility as was found in Greene County. Thirdly, this court in Greene County gave great weight to CEQ's interpretation of NEPA (455 F 2d at 421). CEQ has recognized and approved the procedures in PPM 90-1.

Five other Circuit Courts have found the FHWA procedures for preparation of the EIS to be proper. In Life of the Land v. Brinegar 485 F 2d 460 (9th Cir. 1973) cert. denied 42 USLW 3595 (April 22, 1974) the court found the FAA procedures under attack to be analogous to the FHWA procedures (used herein) and concluded that this method was not in violation of NEPA. The court specifically distinguished it from the questions raised by Greene County.

In Citizens Environmental Council v. Volpe 484 F 2d 870 (10th Cir. 1973), cert. denied, 42 USLW 3584 (April 15, 1974) ruled the Secretary of Transportation's procedures were consistant with NEPA..

In Iowa Citizens for Environmental Quality Inc. v. Volpe 487 F 2d 849 (8th Cir. 1973) the court specifically distinguished Greene County by the extent of the FHWA's participation and ruled their procedures proper under NEPA.

In Finish Allatoona's Interstate Right, Inc. v Brinegar 484 F 2d 638 (5th Cir. 1973), Aff'g. 355 F. Supp. 933 (ND GA 1973) the lower court there had found the FHWA's procedures consistant with NEPA's intent.

In Movement Against Destruction v. Volpe ___ F 2d _____ (4th Cir. Mar. 19, 1974) Aff'g. 361 F. Supp. 1360 (DC MD 1973) the FHWA's procedures were also ruled as proper.

In addition, several district courts have ruled the procedures followed here to be proper under NEPA. Citizens for Mass Transit Against Freeways v. Brinegar, 351 F. Supp. 1269 (D. Ariz. 1973); National Forest Preservation Group v. Volpe 352 F. Supp. 123 (D. Mont. 1972).

We believe that nothing in these cases is contrary to Greene County for the participation by the federal agency (FHWA) is quite different and this court in Greene County did not rule that the EIS is the exclusive duty of the federal agency under all circumstances.

POINT II

THE RESPONSIBLE OFFICIALS ACTIONS RELATIVE TO THE CONSIDERATION OF ALTERNATIVES WERE SUFFICIENT AS REQUIRED BY SECTION 102(2)(c) OF NEPA OF 1969 42 USC, 4332(2)(c) AND AS FOUND BY THE DISTRICT COURT THE EVIDENCE AND EQUITIES WARRANTED THE DENIAL OF THE INJUNCTION.

In considering this question, many courts have determined that the test applicable is the question of whether there has been a good-faith consideration of the environmental factors under the standards set forth in Section 101 and 102 of NEPA, 42 USC 4331,4332. This test is set forth in Environmental Defense Fund, Inc. v. Froehlke 473 F. 2d 346,353 (8th Cir. 1972), and was the same test adopted by the Honorable Judge Oakes in Conservation Society v. Secretary II 362 F. Supp. 627 (D. VT 1973). The test requires a good-faith consideration of the impact of the project on the human environment by the involved agencies. This same test was used by the court in Calvert Cliffs Coordinating Committee v. V.P.C. 449 F. 2d 1109,1115 (DC Cir. 1971).

The Plaintiffs in this action indicate that their primary claim of deficiencies in the EIS are related to the so-called Sleepers River interchange and its effect upon the environment, particularly with regard to the Sleepers River. They specifically indicate that they accept that Interstate and Defense Highway I-91 will be constructed,

but that the interchange and alternatives thereto were not properly considered (Op. Page 35). Testimony was presented before the lower court by Mr. Joseph Landry, Traffic Engineer for the Vermont Highway Department, that without an interchange with Route 2 at this location the traffic problems and congestion of the Village of St. Johnsbury would not be relieved and would in fact be worsened and I-91 would not effectively serve the highway user. Testimony was given by Mr. Arthur Goss, Assistant Planning Engineer for the State, that a suggested alternative of the Plaintiffs had been thoroughly studied, and that it was not a viable alternative both due to the terrain and due to the service that it would provide. Thus, it was not included in the EIS. Testimony was given by Mr. Gordon Lane that the effects on the Sleepers River were at least 80% caused by the main line of Interstate 91 and not by the location of the interchange. Testimony by Mr. James McMartin, who is the supervisor of Fish Habitat for the State of Vermont Fish and Game Department, indicated that the Sleepers River was not an outstanding trout stream and that, in his opinion, after careful study and from his experience with similar type work on other streams, the restoration work included in the specifications for the contract would return the stream to as good a fishing habitat as it presently is. Testimony was given by Mr. Sanford Woodbeck of the Utilities Division of the Highway Department that the Sleepers River in this area was polluted, that, in fact, the acquisition and removal of several houses for the construction of this project decreased the pollution and the dumping of sewage into the river. Testimony was given by Mr. Robert Shattuck, Hydraulics Engineer for the State Highway Department, that a study of the river indicated that the construction would not increase the potential for flooding, that the

siltation caused by construction would not go beyond the reaches of the Sleepers River, that, in fact, after completion of the project, there would be less erosion and less siltation than in the present river. Affidavits relative to the foregoing testimony were submitted to this court as a part of the argument to deny the motion to stay pending appeal and are a part of the record, since then, as now, the record from below is not available. Mr. Gordon Lane, Design Engineer for the Highway Department, and Mr. Edgar Stickney, Chief Engineer, indicated that it was possible to build the suggested alternative despite the adverse terrain, in that if one wishes to spend the money one can probably build most anything, but they both indicated that this would not provide the service necessary; it would in effect be a waste of money, and that the construction would be difficult and expensive and cause greater damages and was, therefore, not viable from an engineering or service point of view. Testimony was given by Mr. David Kelley, FHWA Division Engineer, that without this interchange construction must stop, new hearings be held, and a possible 2-year delay result. In the testimony from Mr. Robert Morris, Plaintiffs' witness, he indicated that his statements were based only on opinion and not on any engineering or traffic studies conducted by him, whereas the witnesses who disagreed with him based their opinions on actual studies which they, or people under them, had conducted. The United States Supreme Court, in Zenith Radio Corporation v. Hazeltine, 395 US 100 (1969), said, "in applying the standard of rule 52(a) of the Federal Rules of Civil Procedure, which provides the finding of facts in Federal District Court sitting without a jury, shall not be set aside unless clearly erroneous. Appelate courts must constantly have in mind that their function is not to decide actual issues de novo.

The authority of an appelate court when reviewing the findings of a judge as well as those of a jury is circumscribed by the deference it must give to decisions of the trier of fact who is actually in a superior position to appraise and weigh the evidence and the question for the appelate court under rule 52(a) is not whether it would have made the findings the trial court did, but whether on the entire evidence it is left with the definite conviction that a mistake has been committed."

In Citizens Airport Committee v. Volpe 351 F. Supp. 52 (ED Va. November 14, 1972) the court stated, "NEPA does not require that solutions be proposed for all potential environmental problems created by a Federal project; rather the act is designed to insure that Environmental factors are considered by the agencies in all of their acts to the end that the encouragement be given to the declared national policy of productive and enjoyable harmony between man and his environment."

On Page 23 of Judge Coffrin's opinion, he states, with regard to the alternative of no interchange, "this court shared the latter belief (an unequivocal belief that Sleepers River interchange is necessary to link 91 with existing US 2) and is satisfied that the Sleepers River interchange needs to be built for the benefit of the travelling public and the effective utilization of I-91 regardless of whether the 4.3 mile relocation of existing Route 2, which is being considered separate from this opinion, is accomplished or not." Evidence was also presented that the existing Route 2 in its present location was such that the road is unsafe, that it could not feasibly or practicably be widened, straightened, or made safe without a large disruption of residences and businesses along said road, and that at the point where it crosses

I-91 the terrain is such that an interchange could not be constructed. In Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (DC Cir., January 13, 1972) the court said, "We reiterate that the discussion of environmental effects of alternatives need not be exhausted. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned." In the same case, they also said, "In this as in other areas, the function of the courts and agencies rightly understood are not in opposition but in collaboration toward achievement to the end prescribed by Congress. So long as the officials and agencies have taken the hard look at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of action to be taken."

In view of the contents of the EIS and of the evidence presented at the many days of hearing, as reflected in Judge Coffrin's opinion, it is clear that the intent of NEPA was fully subscribed to and carried out. The impact on the environment was fully weighed before construction began. If some formal step in the procedure was inadvertently violated, an allegation which we do not subscribe to, the substantive results would clearly be the same and to overturn the lower court's decision on this ground alone would be unwarranted and against good conscience. In First National Bank of Homestead v. Watson 362 F. Supp. 466 (D. DC 1973) the court said "Even assuming technical non-compliance with NEPA if the Commission has considered all relevant environmental factors and has reached a fair and informed decision under NEPA, its findings should not be set aside." We would say that this clearly applies in

this case. We believe that Judge Coffrin was thinking along the same paths in his decision as those expressed by the DC Circuit in a recent case, "Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task." Mr. Chief Justice Burger as Circuit Justice for D.C. Circuit. Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207,1217 (1972).

POINT III

THE PROVISIONS OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 33 USC SECTION 1301-1444 AND THE RIVERS AND HARBORS ACT OF 1899 33 USC SECTION 403 AND 407, DO NOT APPLY TO THE CONSTRUCTION ACTIVITIES ON THE SLEEPERS RIVER.

The Plaintiffs contend that 1972 Amendments to the aforementioned Acts changed the whole test of what waters are governed by permits from the Corps of Engineers and/or United States Coast Guard by deleting the word "navigable in the definition, as used in the Water Pollution chapter, and referring only to the waters of the United States. It is our contention that whereas this may have broadened the definition by taking out the actual fact of navigability, it is still limited to that which is constitutionally permissible. The Constitution, in Article I, Section 8, vests the Congress with the power to regulate "commerce with foreign nations and among the several

states." The Joint Explanatory Statement of the Committee of Conference on the 1972 Amendments said, "The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation, unencumbered by Agency determinations which have been made or may be made for Administrative purposes." Conference Report and Senate Report No. 92-1236, September 28, 1972, Page 144, US Code Congressional and Administrative News 1972, Page 3822. This report itself indicated that Congress was still well aware of certain limitations on their power to control and regulate streams. This broadening, moving away from the actual term of navigability, still required under the Constitution that the waterway use be in some way connected with commerce between the several States or foreign countries. In debate on the Conference Bill, Representative Dingell stated, "The Conference Bill defined the term 'navigable waters' broadly for water quality purposes. It means all the waters of the United States in a geographic sence. It does not mean navigable waters of the United States in a technical sense as we sometimes see in some laws." 1 Legislative History of the Water Pollution Control Act Amendments of 1972 p. 250 (1973). Representative Dingell also said, "This new definition fully encompasses all water bodies, including main streams and their tributaries for water quality purposes. No longer are the old narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Id." We would call to the Court's attention that in both these statements by Representative Dingell he is referring to water quality purposes. We submit that the intent of the bill is clear in the bill itself; that where the water quality of streams affect bodies of water which do come under the commerce clause in the Constitution, that is they are used for commerce between the States or foreign

countries, they then would be covered quite properly by this new Act. However, Representative Dingell's conclusion that all bodies of water are covered by this Act is not necessarily the clear intent nor the clear authority of Congress to control. A search of the Congressional Record seems to indicate that Representative Dingell's remarks came in floor debate on the Committee Report. It is noted that the Vermont District Court said, in the case of State of Vermont v. Brinegar _____ F. Supp. _____ (D. VT 1974), "We are cognizant that the opinions of individual legislators concerning the meaning of legislation should not be considered conclusive or controlling as to legislative purpose. Universal Underwriters Insurance Company v. Wagner, 367 F. 2d 886,874 N. 14 (8th Cir. 1966). Moreover, this rule of construction is especially applicable where, as in this case, the comments referred to above were made during the floor debates in the House and Senate concerning the bill and thus not entirely entitled to the same respect as the carefully prepared Committee report." In Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109 (DC Cir. 1971), the Court said, "As the Supreme Court often has said, the legislative history of a statute cannot radically affect its interpretation if the language of the statute is clear." This same principle is found in the Packard Motor Car Company v. NLRB 330 US 485 (1947); Kuehner v. Irving Trust Company, 299 US 445 (1937); Fairport, Painesville and Eastern Rail Company v. Meredith 292 US 589 (1934); and Wilbur v. US ex rel. Vindicator Consolidated Gold Mining Company, 284 US 231 (1931). Judicial determination as to what is and is not covered by the commerce clause in the Constitution was summed up as early as 1824 in an opinion by Chief Justice Marshall in Gibbons v. Ogden 9 Wheat 1, 195, "Activities which are beyond the

reach of Congress are those which are completely within a particular State, which do not affect the other states and with which it is not necessary to interfere for the purpose of executing some of the general powers of government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." This was cited as recently as 1964 in the case of Katzenbach v. McClung 379 US 294. The precept established by Chief Justice Marshall in McCullock v. Maryland 4 Wheat. 316,423 (1819) that "Congress may not, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government" is as valid today as it was then. In US v. Darby 312 US 100 (1940) the Supreme Court indicated that even under the most liberal construction there are still constitutional limits on Congressional authority when they stated, "The power of Congress over interstate commerce is not confined to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." (emphasis added.)

It is therefore the Defendant State's contention that even under the broadened definition of navigable waters or waters of the United States, it is still necessary to show some effect on another State or on a waterway used by or in the course of interstate commerce. In the instant case, evidence was clearly presented that any materials placed in the water would not go beyond the reaches of the Sleepers River due to the fact that they would be less than is presently eroded into the river and that there are dams downstream, prior to reaching the Passumpsic River, which would catch any soil or material moving

downstream, coupled with the extraordinary precautions in construction, such as dry construction. Thus, it is clear that none of the operations within the Sleepers River can possibly affect the Passumpsic or the Connecticut, and the Connecticut, it is equally clear, is the only navigable waters under the test of navigability. If there were discharges of pollutants which could affect the interstate waters, then it is equally clear that the 1972 Amendments would properly include and require regulation thereof, under the proper use of the Commerce Clause of the Constitution. The sole thrust of the 1972 Amendments was toward the discharge of pollutants into a stream. The change in definition of navigable waters is prefaced in 33 USC Section 1362 that this definition is used only in this particular chapter. For purposes other than the discharge of pollutants certainly the old definition as stated in United States v. Pot-Nets Inc., et al 363 F. Supp. 812 (D. Del. 1973), applies, "A body of water is navigable water of the United States if 1) it is presently being used or is suitable for use, or 2) has been used or was suitable for use in the past, or 3) could be made suitable for use in the future by reasonable improvements for transportation and commerce." "While the courts have quite properly broadened the requirement of a permit in navigable waters to include any activities which have the effect of creating an obstruction to the navigable capacity of any water of the United States, and have also held that where a permit is required the government may take environmental considerations into account in deciding whether to issue the permit, Zabel v. Tabb 430 Fed. 2d 199 (5th Cir. 1970), it does not necessarily follow that an ecological impact on navigable water without more is enough to require a permit under the Rivers and Harbors Act, except as the discharge of pollutants

which reach said navigable waters may do." In the United States of America v. American Cyanamid Company 354 F. Supp. 1202 (S.D.N.Y., 1973), where the case involved a tributary of a navigable stream, the court, although enlarging on navigability and need of the permit, still said, at 1205, that "The important consideration is the relationship of the tributary to the navigable water. Is it so situate that an ebb tide and the downstream current will be likely to wash refuse down to the river?" In our present case, there has been ample evidence to show that no downstream current could in any way wash refuse, silt or other material downstream to the navigable Connecticut River. Therefore, even under the broadened view, that so long as there is no evidence to the contrary, the Sleepers River would not constitutionally be considered a navigable stream or water of the United States requiring a permit. In the Circuit Review of the United States v. American Cyanamid 480 F. 2d 1132 (2d Cir. 1973), the Court continues to indicate that there has to be the possibility or likelihood that the material discharged into the tributary must reach the navigable water. Again, in the case at hand, all the evidence presented indicated the impossibility of this occurring and there was no evidence to the contrary. It is noted also that the 1972 Amendments to the Water Pollution portion of the Act really made no great change when in the Conference report, they stressed the fact that the term navigable waters be given the broadest possible constitutional interpretation for that this has long been the Supreme Court's direction, in United States v. Standard Oil Company 384 US 224 (1966) at 230 the Court said that the act was to be read "charitably." This was also stated in United States v. Republic Steel Corporation, 362 US 482,491 (1960). The Defendant would call the court's attention to two cases used by the Plaintiff, the United States v. Ashland Oil and Transportation Company, 364 F. Supp.

349 (W.D. Ky, 1973) and United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974). Both these cases are quite distinguishable from the case at hand. In the Ashland Oil Company case, there was a definite pollutant which was being discharged into the stream, a pollutant which could spread to other streams which would, in fact, affect the quality of the waters as they proceeded downstream. In the Holland case, the material was being placed into a marsh that was regularly covered by the tide and therefore was being regularly and constantly washed into what are undeniably navigable waters, that of the ocean. Neither of these sets of facts apply in the case at hand, in that nothing is being washed into a navigable water nor is anything being carried beyond the limits of the particular small tributary known as the Sleepers River.

In April of 197' the Department of Defense, Corps of Engineers issued new regulations found in 33 CFR Part 209, 39 FR 12115, April 3, 1974. In particular, the Court's attention is called to the Department of Defense's statements relative to the administrative definitions to be used considering the 1972 Amendments and the Conference Report thereto. Under these regulations, it seems apparent that the Sleepers River and the type of activity being done thereon would not come under the requirements as set up by the Engineers for a permit. The Federal Register, Volume 37, No. 176 Saturday, September 9, 1972, contains the definition of navigable waters of the United States used by the Department of Defense. It has long been judicial precedent that the courts give considerable weight and deference to the interpretation of statutes by the Agency empowered to carry them out. In Federal Security Administrator v. Quaker Oats Company, 318 US 218 (1943), the Supreme Court said, "The allowance by the courts of considerable scope to the discretion and informed judgment

of the administrative agency is especially appropriate where the review is of regulations of general application and adopted by such agency and under its rule-making power in carrying out the policy of the statute with the enforcement of which it is charged." In FCC v. Schreiber, 381 US 279 (1965), the court said, "In providing for judicial review of administrative procedural rule-making, Congress has not empowered Federal District Courts to substitute their judgment for that of the agency, but has limited judicial responsibility to insuring consistency with the governing statutes and the demands of the Constitution." In the case of State of Vermont v. Brinegar, supra, The Vermont District court gave considerable deference to the interpretation given the statute by the Secretary of Transportation. It is the Defendant's contention, based on the regulations of the Army Corps of Engineers that clearly the type of activity involved in Sleepers River does not in any way come under the Rivers and Harbors or Water Pollution Act requirements for a permit. This view is further supported by the August 5 letter from the Corps of Engineers to Commissioner Gray and by the fact that both the Corps of Engineers and the Coast Guard reviewed the EIS and the construction plans, as was shown by the evidence, with no comments regarding permits. To adopt the very broad view embraced by the Plaintiffs would in effect say that any stream, regardless how small, which was going to have any alteration to it, would require a permit from the Army Corps of Engineers. Just in the small geographical area of Vermont, in one year's time there are upwards of several thousand culverts on small streams or water courses replaced or changed by both Town and State Government; there are well over a hundred bridges repaired, replaced, or otherwise worked upon by the towns as well as the state;

there are untold thousands of cases of land owners and farmers reshaping the banks of small brooks to protect their property; there are the many cases, such as after the emergency flooding, of replacement of roads; and myriad other municipal activities all of which would require a permit. Multiply this by the literally millions of similar actions annually being done throughout the United States, and it clearly would be an impossible and impractical proposition for the Corps of Engineers to hold hearings and issue permits on every one of these activities. These are quite different from the activities of polluting or in some way affecting the water quality of a stream and most of this type of activity on the small streams is controlled by various and sundry State laws, e.g. 10 VSA Chapter 47, and even that would be somewhat absurd to expect the Corps of Engineers or the Coast Guard to become involved in the enforcement of every small spill of any type of pollutant in some small, upland brook or stream. The Plaintiffs' broad interpretation could even be considered to prohibit farmers from fertilizing or otherwise improving their crop land without a permit from the Corps of Engineers. It has long been a judicial precedent as stated in the case of NLRB v. Lion Oil Company, 352 US 282 (1956), "A construction of a statute so as to produce incongruous results should not be accepted." In US v. Ryan 284 US 167 (1931) and in US v. Katz 271 US 354 (1925), the court very clearly stated the controlling judicial reasoning, "All laws are to be given a sensible construction, and a literal interpretation of the statute which would lead to absurd consequences is to be avoided wherever a reasonable application can be given which is consistent with the legislative purpose." In US v. Powers 307 US 214 (1938), the court said, "A statute should not be construed in such a manner as to render

it partly ineffective or inefficient or to cause public injury or inconvenience, if another construction will make it effective."

In summary, the Defendant State believes that (a) the broad interpretation of the 1972 Amendments urged by the Plaintiff would be beyond the Congressional powers on the facts of this case and therefore be unconstitutional, and that the clear intent of Congress was not to attempt such an unlimited broadening of its powers. The cases relied upon by the Plaintiff are quite distinguishable from the Sleepers River on their facts. (b) The Corps of Engineers as the agency charged with enforcing and regulating the law has, after careful and reasoned consideration of the Congressional actions and legal precedent, adopted rules, regulations and definitions which rule out the proposed activities in the Sleepers River as requiring a permit, and that such agency action should be given great weight in the absence of any evidence that it is arbitrary. (c) That the unlimited interpretation urged by the Plaintiff would create an impossible situation relative to issuance of permits.

There was no evidence that the Sleepers River was, used to be, or could become a navigable water under the Rivers and Harbors Act. There was no evidence that even under the revised Water Pollution Control Act definition that any pollution would ever reach a navigable stream, but even if it could the Planitiffs, who in other portions of their action are urging absolute compliance with vague requirements of federal statutes, failed to meet the specific requirements for citizen suits under the Water Pollution Control Act.

POINT IV

THE DISTRICT COURT WAS WELL WITHIN THE PRECEPTS OF APPLICABLE LAW IN ITS CONSIDERATION OF THE MERITS OF THE PLAINTIFFS' CLAIM AND THE BALANCING OF THE EQUITIES AND THE APPELATE REVIEW OF SUCH ACTIONS MUST BE NARROWED TO WHETHER THERE WAS OBVIOUS ERROR.

We have a situation where the court has found on the evidence that this is a needed highway (Op. Page 32); where the Plaintiffs themselves accept the fact that I-91 is needed. We have evidence that the economics of the entire northeastern portion of the State of Vermont, a relatively depressed economic area, are closely tied with completion of the Interstate (Op. Page 36). We have the fact that this is the last link in this interstate highway system, which was mandated by Congress. We would point out as the District Court said in Brooks v. Volpe 350 F. Supp. 269-277 (W.D. Wash. 1972), "While Congress has increasingly expressed concern for protection of the national environment, it has also articulated a strong national policy to complete construction of the interstate highways as soon as possible." We would point out that the evidence shows that within the Town of St. Johnsbury itself, an economically depressed area with one of the highest unemployment rates in the State of Vermont, more than 100 jobs would immediately be affected. The evidence shows that a delay at this time merely to comply with procedural requirements which clearly from the evidence would result in the same conclusions, (Op. Page 33) would cause a delay of at least one year in this needed and necessary project and delay it beyond the critical time point of the summer of 1976 when it is projected that the already congested traffic will take a dramatic jump due to the 1976 Summer Olympics. There is evidence that a delay, which due to the short

construction season in Vermont would cause up to a year's delay, would cost the highway users in taxes at least $1,000,000 due to the very inflationary nature of the economy at the present time. On the other side of the coin, we have the admitted impact upon the Sleepers River in the area of construction. However, there was considerable testimony pro and con as to any long-lasting effects upon this river with relation to its environment, its fishing, its purity, its erosion, and all the other factors that make up the human environment. All this evidence was heard and weighed by the Honorable Judge Coffrin. Based on the equities alone, as stated in 73 CJS Public Administrative Bodies and Procedure Section 241, Page 610, "reversal of administrative decision on the grounds of the administrative body has misinterpreted the law does not prevent it from making the same decision on proper grounds on a subsequent application." Further in the same volume, 73 CJS (supra) 252(c) page 617, it says, "As in civil actions generally, all reasonable presumptions in favor of the ruling of the court below on review of the order of an administrative agency may be indulged on for their review, and the presumption in favor of the correctness of the determination by the board when affirmed by the lower courts should be given great weight on further review in an appelate court." The prevailing view has long been as stated in Frederickson v. Reynard 247 US 207 (1918) that "equity looks to the substance of things rather than to their form." The State Defendant respectfully submits that if this court should feel, despite the lower court's ruling, that, procedurally, there was some error in the compilation of the EIS or its contents, that the evidence clearly shows in substance that the intent of NEPA was carried out, that all necessary things were considered, and that in

balancing the equities this substantive correctness that general principles of equity apply in NEPA cases as well as other environmental actions has been recognized and affirmed by many courts; Mr. Chief Justice Burger as Circuit Justice for the D.C. Circuit reflected this in Aberdeen & Rockfish R. Co. v. SCRAP (supra). The 8th Circuit affirmed this principle in Environmental Defense Fund v. Armstrong 352 F. Supp. 50,60 (N.D. CAL 1972), Aff'd 487 F. 2d 814 (1973).

Based upon the evidence the question of irreparable harm to the Sleepers River is, at the least, controversial and only if a definite mistake has been made should the appellate court set aside the findings of the trial court, Zenith Radio Corp. v. Hazeltine (supra).

Court of Appeals will not retry facts and a finding based on sharply conflicting evidence is conclusively binding on appeal. U.S. v. 79.95 Acres of Land, More or Less, in Rogers County, OK, 459 F. 2d 185 (10th Cir. 1972); Buena Vista Homes, Inc. v. U.S., 281 F. 2d 476 (10th Cir. 1960).

Deference of an appellate court to the trial court's findings of fact presupposes that the trier of the fact did not merely apply some supposed rule of law but exercised his judgment. Maggio v. Zeitz, 333 U.S. 56 (1948).

The District Court did restrain a portion of the projects covered by the EIS for reasons not yet expressed but after hearing all the evidence and balancing the equities refused to injoin other portions of the projects, a procedure approved in Ohio ex rel Brown v. Calloway 497 F. 2d 1235 (6th Cir. June 6, 1974). In that case the circuit court

said, "Our review is therefore limited to determining whether the district court abused its discretion under the traditional principles of equity." It also said, "We cannot say that the district court in tailoring the relief granted to the particular circumstances of this case abused its discretion."

We believe the principles recited by Judge Coffrin on Page 34 of his Opinion relative to equity powers of a court best sum up the controlling law:

"In Hecht Co. v. Bowles, 321 U.S. 321 (1944), the Supreme Court gave a classic statement of the powers of an equity court in refusing to order the lower court to grant what the plaintiffs claimed was a mandatory injunction.

> The essense of equity jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

321 U.S. at 329.

Generally, the granting of injunctive relief is within the discretion of the court and the court must balance the interests of the parties and the public interest. Wright v. Cripps, 292 F. Supp. 294 (D. Del. 1968), citing A.F. of L. v. Watson, 327 U.S. 582 (1945); Pennsylvania v. Williams, 294 U.S. 176 (1934). In Bowers v. Calkins, 84 F. Supp. 272 (D.N.H. 1949), the Court stated,

> Application under the equity jurisdiction of a court for the extraordinary remedy of an injunction always constitutes an appeal to the sound discretion of the court, and in the exercise of discretion courts of equity traditionally have not limited their consideration to the interests of the parties alone but have had regard for the interests of the public as well.

84 F. Supp. at 278"

CONCLUSION

The District Court's decision on all points raised by this appeal should be affirmed. With respect to Point I, an EIS jointly prepared by FHWA and the VHD satisfies both the letter and the spirit of the law. With respect to Point II, where evidence shows that an inadvertant omission in an otherwise adequate and good-faith EIS would not change the final result should the EIS be rewritten and further shows the omitted portion was in fact considered, then on balancing the equities of the damage to the public interest the flawed EIS should not be overturned. With respect to Point III that the Sleepers River is not a navigable stream under the Rivers and Harbors Act of 1899 and that the Plaintiffs failed to adhere to the notice requirements of the Water Pollution Control Act and that in fact the proposed actions on the Sleepers River do not fall within the purview of said Water Pollution Control Act. With respect to Point IV the district court acted within the scope of its equity authority in balancing the equities of this case and did not misinterpret the law.

Respectfully submitted

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et al.

TABLE OF CONTENTS

TABLE OF CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

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v

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Defendant-Appellees

AFFIDAVIT OF SERVICE

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